IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NOS. 28 AND 29 OF 2004

CRIMINAL APPEAL NO. 28 OF 2004

Mr. Surendra Kerkar,
Of full age, married,
Son of Shri Anant Kerkar,
Indian National, Resident of
H. No.415, Morod, Sangolda,
Bardez, Goa.
Presently in the Central Jail
at Aguada, Goa.
Represented through his wife,
Mrs. Milan Surendra Kerkar,
r/o Sangolda, Bardez, Goa. ... Appellant

versus

Union of India,
Superintendent of Central
Excise, Anti-Smuggling Unit,
Margao, Goa.
Through their Special Prosecutor. ... Respondent

Mr. Gopal Kanekar, Advocate for the Appellant.

Mr. Joseph Vaz, Special Public Prosecutor for the Respondent.

CRIMINAL APPEAL NO.29 OF 2004

Mr. Nandkishore Arolkar,
presently lodged in
Central Jail, Aguada,
Sinquerim, Bardez, Goa. ... Appellant

versus

Union of India,
as represented by
Officer-in-Charge,
Anti-Smuggling Unit,
Margao, Goa. ... Respondent

Mr. V. P. Thali, Advocate for the Appellant.

Mr. Joseph Vaz, Special Public Prosecutor for the Respondent.

CORAM : N. A. BRITTO, J.

DATE : 16TH AND 17TH NOVEMBER,2005

ORAL JUDGMENT

These appeals are filed by A-1/Nandkishor Arolkar and A-2/Surendra Kerkar in Special Criminal Case No.26/2001

questioning the correctness of the Judgment/Order dated 21/29-4-2004 of the learned Special Judge, N.D.P.S. Court, Mapusa, convicting and sentencing them under Section 21(c) of the Narcotics Drugs and Psychotropic Substances Act, 2001(Act, for short) to undergo 10 years R.I. and to pay a fine of Rs.1,00,000/-, in default to undergo S.I. for a period of one year.

2. A-3/Datta Kundnekar has been absconding. A-1/Arolkar and A-2/Kerkar were charged and tried under Section 21(c) of the Act upon a complaint filed by the Complainant-Shri M. P. Vaz, Superintendent of Central Excise, Anti-Smuggling Unit, Margao. The facts stated by the said Complainant/PW6 in the complaint and deposed to by him are that on 19-2-2001 at around 18.30 hours Inspector Cruz/PW7 had received information that Nandkishor Arolkar of given description would be carrying a substantial quantity of brown sugar from Calangute to Panaji at 20.00 hours on a blue coloured Chetak scooter bearing No.GA-01-M-2034 and one Surendra Kerkar of a given description would be accompanying him and the said information was reduced into writing by the

said Cruz/PW7 in Form D.R.1 and given to him in sealed cover. The same was produced at Exh.86. Further, it was the case of the Complainant that copies of the said Form D.R.I were sent to the Deputy Director and the Assistant Director, DRI, Mumbai and Goa and to the Commissioner of Central Excise, Goa and the same was also conveyed to the complainant's immediate superior namely, Assistant Commissioner Shri Monteiro who gave instructions and directions to conduct the raid and accordingly a team consisting of the said Shri Cruz, Shri U. B. Pandey, Nitin Parrikar, Jayant Hadconkar, all Inspectors and two sepoys and a driver was formed and all of them proceeded in a Departmental jeep and positioned themselves near Sai Service, at 19.30 hours along with two independent persons, namely, Arnaldo Costa/PW3 and Vaibhav Lotlikar and kept surveillance and upon reaching there the Complainant informed about the reliable information received by the said Cruz/PW7 and that at about 20.15 hours they spotted a blue coloured scooter having the said registration number which was coming from Porvorim towards Panaji with two persons sitting astride and they signalled to the rider to stop the scooter and after the rider stopped, the Complainant identified himself by his name and designation and

by showing the identity card informed the said riders about the said reliable information received by the said Cruz and on having asked them, they gave their names as Nandkishor Arolkar and Surendra Kerkar. Further, the Complainant stated that the Complainant informed the said two accused that they had a right to search the members of the raiding party as well as the panch witnesses which the said accused declined and in the meantime they noticed that the pillion rider A-2/Surendra Kerkar was carrying a white colour plastic bag with inscription "Nida Boutique" and then introduced the members of the raiding party and the panchas to both the accused and when asked about the contents of the bag A-1/Nandkishor Arolkar replied that it contained brown sugar, and as the place was not safe to conduct the panchanama, the Complainant asked both the accused to sit in the Departmental vehicle and thereafter they proceeded to the Customs House, Panaji and the scooter was brought by the sepoys Kambli and Cabral who had accompanied them and all along the journey A-2/Surendra Kerkar was carrying the said plastic bag in full view of the panchas and the members of the raiding party. The scooter followed the Departmental jeep within their visibility and on reaching the Customs House, Panaji, Shri Cruz/PW7 made both the accused aware individually of their right to be searched before a Magistrate or an

independent Gazetted Officer but both the accused declined the offer and opted to be searched before the Complainant and this option was exercised by both the accused individually whereupon PW7/Cruz took physical search of A-1/Nandkishor Arolkar and found with him a driving licence with photograph of A-1/Nandkishor which was seized and on physical search being taken of A-2/Surendra Kerkar, cash of Rs.20/- and a driving licence was also found and the said cash was returned to A-2/Surendra Kerkar while the driving licence was seized. Further, the Complainant stated that the white coloured plastic carry bag which was kept by A-2/Surendra Kerkar on the table in full sight of the panchas and the two accused was opened and it was found containing two transparent double packed polythene bags containing brownish powder and the Complainant opened one of the said bags and took a pinch of it and tested the same with the help of a Field Testing Kit and the same was found to be positive for brown sugar-heroin and similarly a pinch of the brownish powder was taken from the second bag and the same was also tested positive for brown sugar-heroin and then the contents of the said two double packed polythene bags were emptied into a large transparent polythene bag and thoroughly mixed and a pinch was tested with the Field Testing Kit and again it was tested positive for brown sugar-heroin and then the bag was weighed on a weighing scale and found to be 2.01 kgs. and thereafter two representative

samples of 10 gms. each were taken in two separate polythene bags, and were heat sealed and put in two brown paper envelopes, pasted with gum and on each of the envelopes the details of the seizure were recorded and then sealed with the brass seal with inscription "South Goa Anti-Smuggling Unit, Margao" and the signatures of both the panchas were taken on each of the said envelopes and so also signatures of both the accused as well as the Seizing Officer Shri Pandey and the said two envelopes were marked as Sample S-1 and Sample S-2 and the balance quantity of 1.990 kgs. was sealed and then put in a corrugated box and after all the edges were pasted with masking tape a white paper was pasted on the top of the corrugated box. The details and the description of the contents were recorded and then the corrugated box was tied with jute thread and sealed with the said brass seal and thereafter the white plastic bag with inscription "Nida Boutique" and also the two polythene bags with double packing were put in a brown envelope, pasted with gum, details of seizure and contents were recorded and were signed by the Seizing Officer Shri Pandey, the panchas and sealed with the brass seal with the said inscription. As per the Complainant, the entire quantity of 2.01 kgs. of brown sugar was valued at Rs.2 crores and the entire procedure was done under the panchanama which was signed by the panchas and the Seizing Officer, Shri Pandey and a copy of which

was given to each of the accused who had signed the panchanama as token of its receipt. Panchanama was produced at Exh.67.

3. Further, the Complainant stated that he issued summons to A-1/Arolkar on 19-2-2001 which was duly received by him and his statement was then recorded before him by the said Shri Pandey and in his statement A-1/Arolkar admitted the possession and transportation of 2.01 kgs. of brown sugar and stated that the same was given to him by A-3/Datta alias Bhai alias Nana Kundnekar and that the said brown sugar was meant for sale to a prospective buyer, etc. The complainant stated that he also issued summons to A-2/Kerkar on 19-2-2001 which was received and acknowledged by him and thereafter the statement of A-2/Kerkar was recorded in his presence by the said Shri Pandey, and, in his said statement A-2/Kerkar admitted that he had accompanied A-1/Arolkar to Panchdeep restaurant at Calangute and had seen A-3/Datta handing over the white coloured plastic bag to A-1/Arolkar and that A-1/Arolkar had given the said bag to him to hold as he was riding the scooter and which was to be delivered to one person at Miramar and that A-1/Arolkar on reaching Porvorim disclosed to him that the contents of the said carry bag were brown sugar. The statements recorded of A-1/Arolkar and A-2/Kerkar were produced at Exhs.90 and 92. Further, the Complainant stated that

A-1/Arolkar was arrested at 06.20 hours on 20-2-2001 after issuing a notice of arrest and likewise A-2/Kerkar was arrested at 06.15 hours on 20-2-2001 and thereafter he sent a report under Section 57 of the Act to the immediate Superior Officer Shri Monteiro, the Assistant Commissioner of Customs who acknowledged its receipt and a copy of the said report was produced at Exh.95. The Complainant stated that one of the samples of 10 gms. namely, S-1 was submitted to the Director of Food and Drugs Administration, Panaji, for analysis in sealed condition and the other sample namely, S-2 with the remnant quantity in corrugated box-Exh.A were submitted to the Warehouse at Panaji on the same day and later the said Chetak scooter bearing No. GA-01-M-2034 was also deposited in the Warehouse and the Warehouse Officer had acknowledged the receipt of the same, and, although the search was carried out of the respective residences of the accused nothing incriminating was found and thereafter summons were issued to Krishna S. Shirodkar/PW4, the owner of the said scooter and his statement was also recorded. Likewise, summons were also issued to Kundan Gadekar/PW5 and his statement was also recorded. Further, the Complainant stated that summons were also issued to A-3/Datta Kundnekar which were received by his brother Sunil but he failed to appear on the stipulated date and summons were also issued to the said Sunil Kundnekar

and his statement was also recorded. The Complainant stated that after the receipt of the report from the Laboratory he filed the said complaint.

5. The Complainant/PW6 in support of his case examined PW1/Mahesh Kaissare who confirmed having received an envelope on 20-2-2001 as per particulars given in his report and that the seals fixed on the same were intact and tallied with the specimen seal impression sent separately on a test memo and that the said envelope contained 11.16 gms. of brownish coloured powder which he analysed by taking 3 gms. as representative sample and found that the same contained 29.29% W x W of Heroin. PW1/Kaissare also confirmed that on 7-3-2002 he had received from the Special Judge, N.D.P.S. Court, Mapusa one sealed envelope marked as S-2 containing representative sample of brown sugar and a sealed brown coloured paper carton marked as Exh.A which carton he opened on 25-3-2002 and it was found to contain 2.055 kgs. of brownish powder of which he took 30 gms. of representative sample for analysis and found that it contained 30.66% W x W of Heroin.

6. The Complainant examined the Warehouse Officer namely, PW2/Fatima Noronha who produced complainant's forwarding letter at Exh.51 which shows that the sample was received by her at about 3.30 p.m.

on 20-2-2001. She confirmed that the Complainant on 20-2-2001 had come with 3 sealed packages and she had issued a godown receipt to him and that on 2-4-2001 the Complainant had come with a scooter bearing No.GA-01/M-2034 regarding which she had also made an entry on the Warehouse register.

7. The panch witness Shri Arnaldo Costa was examined as PW3 and he has corroborated the version of the Complainant.

8. PW4/Krishna Shirodkar stated that the Bajaj Chetak scooter bearing registration No.GA-01/M-2034 was purchased by him and thereafter it was given to his nephew PW5/Kundan Gadekar and that after using the same for a year and a half he had given the same to his nephew and the said nephew continued to have possession of the same till it was attached and later he came to know through the newspaper that it was attached as it was used for transporting of charas and his said nephew had told him that he had given the said scooter to his neighbour Arolkar at Shetyewado, Duler, Mapusa.

9. PW5/Kundan Gadekar stated that on 18-2-2001, A-1/Arolkar had come to him and told him that his scooter had broken down and he

wanted his(PW5's) scooter to tow his scooter and as such he gave the said scooter to him but did not return the scooter on the said night and when he went to his house on the evening of 19-2-2001 he was told by the mother and brother of A-1/Arolkar that A-1/Arolkar had met with an accident at Ponda and was admitted into a hospital and thereafter he came to know through a newspaper that A-1/Arolkar and another person were detained with brown sugar along with the scooter of which the registration number was also published. Inspector Shri Cruz was examined as PW7.

10. The learned Special Judge, after considering at length the evidence led on behalf of the Complainant came to the conclusion that the Complainant had established beyond reasonable doubt that the accused were found in illegal possession of brown sugar-heroin weighing about 2.01 kgs. for which they could not lawfully account. The learned Special Judge also came to the conclusion that the mandatory provision of Section 50 of the Act was duly complied with before taking the individual search of the accused and there was also compliance of Sections 42 and well as 57 of the Act. The learned Special Judge also observed that the endeavour on the part of the defence to create a doubt in the case of the Complainant was in vain and the exercise on the part of the defence that the statements recorded under Section 67 of the Act were not voluntary but was an exercise in

futility and on the contrary the said statements had gained further support to the case of the Complainant which was otherwise established on the basis of the evidence led by them. The learned Special Judge, therefore, held both the accused guilty and sentenced each of them, as aforesaid.

11. At the hearing of this appeal, Mr. V. P. Thali, the learned Counsel appearing on behalf of A-1/Arolkar has made certain submissions with reference to Section 53 of the Act. Before dealing with the said submission it would be advantageous to reproduce the Section which reads thus:

> "53. **Power to invest officers of certain departments with powers of an officer-in-charge of a police station.-**(1) The Central Government, after consultation with the State Government, may, by notification published in the Official Gazette, invest any officer of the department of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces or any class of such officers with the powers of an officer-in-charge of a police station for the investigation of the offences under this Act.
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> (2) The State Government may, by notification published in the Official Gazette, invest any officer of

> the department of drugs control, revenue or excise or any class of such officers with the powers of an officer-in-charge of a police station for the investigation of offences under this Act".

12. Mr. Thali, referring to sub-section(1) of Section 53 of the Act submitted that there was no notification issued in favour of the Complainant conferring upon him the powers of an Officer-in-charge of a police station for purposes of investigation and relying on the case of **Roy V. D.** v. **State of Kerala**((2000) 8 SCC 590) Mr. Thali submitted that arrest and search by an officer not empowered or authorised, in violation of Sections 41 and 42 being per se illegal would vitiate the trial. In answer to the said submission, Mr. Joseph Vaz, the learned Special Public Prosecutor, appearing on behalf of the Complainant produced notifications issued by the Ministry of Finance, Department of Revenue dated 14-11-1985 bearing Nos.S.O.822(E), S.O.823(E) and S.O. 824(E) which read as follows:-

> "S.O.822(E).- In exercise of powers conferred by sub-section (1) of section 42 and section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central Government hereby empowers the officers of and above the rank of Sub-Inspector in the department of Narcotics and of and

above the rank of Inspector in the departments of Central Excise, Customs and Revenue Intelligence and in Central Economic Intelligence Bureau to exercise the powers and perform the duties specified in section 42 within the area of their respective jurisdiction and also authorises the said officers to exercise the powers conferred upon them under section 67.

S.O.823(E).-In exercise of the powers conferred by sub-section (1) of section 53 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central Government, after consultation with all the State Governments hereby invests the officers of and above the rank of Inspector in the Departments of Central Excise, Narcotics, Customs, and Revenue Intelligence and in Central Economic Intelligence Bureau with the powers specified in sub-section (1) of that section".

S.O. 824(E). - In exercise of the powers conferred by sub-section (2) of section 41 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central Government hereby empowers the officers, of and above the rank of superintendent(being officers of Gazetted rank and working in the executive field), in the departments of Central Excise, Narcotics, Customs, and Revenue Intelligence and in Central Economic Intelligence Bureau to exercise the powers specified in sub-section (2) of that section within

the area of their respective jurisdiction.

13. In the light of the production of the said notifications particularly notification dated 14-11-1985 bearing No.S.O.823(E) the submission of the learned Counsel Mr. Thali has got to be rejected.

14. The next submission of Mr. Thali is that the said notifications might have been issued by the Ministry of Finance, Department of Revenue but the Complainant had to show that the same were published on the Gazette. Mr Thali has referred to the case of **I.T.C. Bhadrachalam Paperboards and another** v. **Mandal Revenue Officer, A.P. and others** ((1996) 6 SCC 634)) wherein the Apex Court dealt with the requirement of publication of a rule or order in the Official Gazette and has observed that the object of publication in the Gazette is not merely to give information to public. Official Gazette, as the very name indicates, is an official document. It is published under the authority of the Government. Publication of an order or rule in the Gazette is the official confirmation of making of such an order or rule. The version as printed in the Gazette is final. The same order or rule may also be published in the newspapers or may be broadcast by radio or television. If a question arises when was a particular order or rule made, it is the date of Gazette publication that is relevant and not the date

of publication in a newspaper or in the media. In other words, the publication of an order or rule is the official irrefutable affirmation that a particular order or rule is made, on a particular day(where the order or rule takes effect from the date of its publication) and is made by a particular authority; it is also the official version of the order or rule. It is a common practice in Courts to refer to the Gazette whenever there is a doubt about the language of an Act, Rule or Order. This submission has been met by Mr. Vaz, with much effort, by producing a copy of the Gazette of India, Extraordinary, Part II-Section 3-Sub-Section (ii) dated 14-11-1985 wherein the said notifications namely, S.O.822(E), S.O.823(E) and S.O. 824(E) all dated 14-11-1985 have been published and in view of the said production, the second submission of Mr. Thali also deserves to be rejected. The third submission of Mr. Thali on this aspect is that after Goa became a State w.e.f. 30-5-1987, the Central Government was required to have a fresh consultation with the State Government before issuing any notification under Section 53(1) of the Act and such a consultation not having been made with the State of Goa, after its formation, any notification issued earlier is of no legal consequence. Mr. Thali in support of his submission has placed reliance on an unreported decision of this Court in Election Petition No.1/2002 dated 27-5-2005 in the case of **Chandrakant Uttam Chodankar** v. **Dayanand Raju Mandrekar.** In my view any reference to

the aforesaid decision is wholly irrelevant and misplaced. This submission has been met by Mr. Vaz, the learned Special Public Prosecutor, by placing reliance on Section 69 of the Goa, Daman and Diu Reorganisation Act, 1987 (Act of 1987 for short). In my view, Section 69 of the Act of 1987 is a complete answer to this submission. Section 69 of the said Act of 1987 provides that all Courts and Tribunals and all authorities discharging lawful functions throughout the existing Union Territory or any part thereof immediately before the appointed day shall unless their continuance is inconsistent with the provisions of this Act or until any provision is made by a competent legislature or other competent authority, continue to exercise their respective functions. Needless to say the officers empowered by the said three notifications are bound to continue to discharge their lawful functions throughout the State of Goa, then an existing Union Territory pursuant to the said notifications and without any further consultation from the State of Goa after formation of the Union Territory of Goa into State of Goa.

DATE : 17TH NOVEMBER, 2005.

15. The Learned Counsels appearing on behalf of the accused have contended that the mandatory provisions of Section 50 of the Act have not

been complied with and that on that count, the accused deserve to be acquitted. Mr. V. P. Thali has placed reliance on the decision in the case of **State of Punjab** v. **Balbir Singh**((1994) 3 SCC 299) to contend that the provisions of Section 50(1) of the Act are mandatory and violation thereof per se would be fatal to the prosecution. Mr. Thali has also placed reliance on the case of **State of H. P.** v. **Pawan Kumar**((2004) 7 SCC 735) and has submitted that the matter whether the provisions of Section 50 of the Act are to be complied with in relation to a search of a bag, has been referred to a larger Bench.

16. Mr. G. Kanekar, the learned Counsel appearing on behalf of A-2/Surendra Kerkar has submitted that the offer in terms of Section 50(1) of the Act to be effective had to be made near Sai Service where the accused were accosted and not at the Customs House where the accused were searched. Mr. Kanekar has further submitted that the representation by the Complainant that he himself was a Gazetted Officer and, therefore, the search could be conducted before him was nothing but allurement given to the accused as held by this Court in the case of **Koyappakalathil Ahamed Koya** v. **A. S. Menon and another**(2002 Cri.L.J. 4502).

17. Section 50 of the Act deals with an option being given to a

person to be searched, in case he so requires that he could be searched before a Gazetted Officer or the nearest Magistrate. The object behind this provision is to ensure that there is a safeguard against planting of incriminating articles. As far as the submission that the option was not given at Sai Service where the accused were accosted, I find there is no merit in the same. Since the accused were searched at the Customs House, Panaji, the said option was given before the search and in fact, was required to be given only prior to the search. This is on the assumption that the facts really required an option to be given at all. As far as the said option is concerned, presumably, the same was given on the assumption that it was required to be given even in cases involving search of a bag. The Complainant has stated that on reaching the Customs House, Panaji, Cruz/PW7 had made the accused aware of their right to have an option to be searched before a Magistrate or an independent Gazetted Officer and both the accused had declined the said offer and had opted to be searched before him. PW3/Arnald Costa has corroborated the said version of the Complainant when he stated that Inspector Cruz had given option to the accused individually that they could be searched before a Magistrate or any independent Gazetted Officer which offer they refused individually and since the Complainant was a Gazetted Officer, they agreed that they could

be searched before the Complainant. PW7/Cruz has also confirmed the said position.

18. The Apex Court in the case of **Prabha Shankar Dubey** v. **State of M.P.** ((2004) 2 SCC 56) after taking into consideration the decision of that Court in the case of **Joseph Fernandes** v. **State of Goa**((2000) 1 SCC 707) observed that there is no specific form prescribed or intended for conveying the information required to be given under Section 50 of the Act and what is necessary is that the accused(suspect) should be made aware of the existence of his right to be searched in the presence of one of the Officers named in the Section itself and since no specific mode or manner is prescribed or intended, the Court has to see the substance and not the form of intimation and whether the requirements of Section 50 has been met is a question to be decided on the facts of each case and there cannot be any sweeping generalization or straitjacket formula. Section 50 only provides for additional safeguards which are not specifically provided by the statute and the stress is on the adoption of a reasonable, fair and just procedure and no specific words are necessary to be used to convey the existence of that right. In my view, on facts deposed by the aforesaid 3 witnesses, there is no scope to assume that there was any allurement given by the Complainant by disclosing that he was a Gazetted Officer. This option was

given on the assumption that the option had to be given even in a case of a search of a bag and presumably because the law then was not quite clear on the subject. It has been a consistent view of the Supreme Court that Section 50 applies only in cases of personal search and does not extend to search of bag, container etc. except in case of **State of H. P.** v. **Pawan Kumar**(2004 (7) SCC 735) where there was difference of opinion. Now the Supreme Court speaking through three of its learned Judges in the case of **State of H. P.** v. **Pawan Kumar**(2005 AIR SCW 2154) has reiterated that the word "person" would mean a human being with appropriate coverings and clothings and also footwear. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be a part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc.

Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in the Section 50 of the Act. The Judgment of the three Judges of the Apex Court in the case of **State of H. P.** v. **Pawan Kumar**(supra) has again been followed in the case of **Rajasthan** v. **Daulhat** (2005 AIR SCW 2154). The facts proved show that there was compliance of Section 50 of the Act though the same was not attracted because the search was of a bag being held by A-2/Kerkar.

19. It is next contended by Mr. Kanekar that Section 42 was also not complied with in that the information report in form DRI-1 at Exh.86 was prepared subsequently and not at 18.30 hours on 19-2-2001 as shown therein. Referring to the intimation under Section 57 of the Act produced at Exh.95, Mr. Kanekar submits that in case the telephonic message was received at 16.00 hours on 19-2-2001, as stated therein the said DRI-1 information ought to have been recorded at that time and since the timing in the said information and intimation at Exhs.86 and 95 differs it only reinforces the fact that the said information in DRI-1 was recorded subsequently.

20. The information in form DRI-1 at Exh.86 was apparently reduced into writing by Inspector Cruz/P.W.7 and not by the Complainant

while the intimation under Section 57 of the Act at Exh.95 was addressed by the complainant to the Assistant Commissioner. It is true that at Exh.95, the Complainant has referred to his telephonic message at 16.00 hours on 19-2-2001 but there has been no cross-examination on that aspect of the Complainant at all. In the absence of any cross-examination it is quite probable to infer that some telephonic message was received prior to 16.00 hours by the Complainant and some of them were in the know of some information about the intended transportation and the information itself was subsequently recorded in form DRI-1 at 18.00 hours by Inspector Cruz/PW7 and on that count alone it cannot be said that the information in form DRI-1 was prepared subsequent to the seizure. It has also been submitted by Mr. Kanekar that the information recorded mentions that the persons concerned would be transporting brown sugar from Calangute to Panaji and there is no reason why the Complainant and the raiding party had to stand near Sai Service when there was another route to reach from Calangute to Panaji via Nerul and Betim. When questioned on this aspect, the Complainant himself does not appear to have known about the existence of another route to reach Panaji from Calangute via Betim but PW7/Cruz when cross-examined stated that it was not recorded by him that the party would be travelling from Calangute via Sangolda and Porvorim. He conceded that one could come from Calangute to Panaji via Betim and

Nerul and without coming through Sangolda and Porvorim but in terms did not provide any explanation as to why they chose to station themselves near Sai Services at Porvorim and not at Betim to intercept the accused but certainly an explanation is not very far to find as the route from Calangute to Panaji via Sangolda and Porvorim is the most commonly used route by people travelling from Calangute to Panaji. In my view, only because the information Exh.86 did not have it recorded that the accused would be coming from Calangute to Panaji via Porvorim would be no ground to conclude that the said information - Exh.86 was recorded subsequently. Otherwise also the Complainant as well as PW7/Inspector Cruz has confirmed about the recording of the said information and sending copies thereof to different authorities at about 18.30 hours on 19-2-2001. In the absence of cross-examination regarding the telephonic message at 16.00 hours as mentioned on Exh.95 there is no scope for creating any doubt also that the said information was not recorded at the time it is stated to have been recorded i.e. to say at 18.30 hours of 19-2-2001. The fact that not all details were contained in the said information as regards the age of the accused persons or for that matter as regards the quantity which they would carry is again no reason to discard the case of the Complainant that the information was not recorded at 18.30 hours of 19-2-2001. In a given case when information is received, one cannot expect that all details would be

available to be recorded. This is a case wherein, the information received was recorded by Inspector Cruz/PW7 and furnished to the Complainant and other superior Officers and the raid was conducted by the Complainant himself after informing his superior Officer. Hence, Section 42 of the Act was duly complied with.

21. The next controversy which requires to be addressed is regarding the difference in weight as found by the Complainant and as found by PW1/Mahesh Kaissare. As per the Complainant, the sample S-1 weighed 10 gms. but the same when was weighed by PW1/Kaissare was found by him to have weighed 11.16 gms. The sample S-2 was not weighed at any time by PW1/Kaissare. As far as the remnant quantity is concerned, as per the Complainant, the same was 1.990 kgs. but when the same was weighed by PW1/Kaissare on 25-3-2002 after it was sent to him by the learned Special Judge it was found by him to weigh 2.055 kgs. In other words, there is more weight found in the sample S-1 by PW1/Kaissare of 1.16 gms. and as far as the remnant quantity is concerned, he has found 65 gms. more. Although, PW1/Kaissare was examined before the Court on 10-5-2002 and the Complainant on 27-10-2003 there has been no cross-examination as far as the said difference of weight is concerned. The only explanation now put forward by Mr. Vaz is that the

increase of weight of the sample S-1 was probably due to the fact that PW1/Kaissare weighed the same on a more accurate scale and as far as the remnant quantity is concerned, PW1/Kaissare weighed the same along with the wrapping, namely, a colourless polythene bag. On behalf of the accused, it has been submitted that the panchanama was completed at about 22.50 hours on 19-2-2001 and the Complainant had enough time to manipulate with the weight of the sample as the Complainant had with him the seal as well as the samples taken and the remnant quantity for a considerable period of time till the sample S-2 and the remnant quantity was deposited in the Warehouse with PW2/Fatima Noronha at about 3.30 p.m. It has been submitted by Mr. Kanekar that the seal used for the sealing of the samples by the Complainant was also required to be deposited but the same was not deposited. On behalf of the accused reliance has been placed on the case of **Rajesh Jagdamba Avasthi** v. **State of Goa** (2004 Drugs Cases(Narcotics) 322/2005(9)SCC 773). In reply, it has been submitted by Mr. Vaz that the recording of the statements under Section 67 of the Act was completed at about 6 a.m. and that this is also a case where there has been admission made by the accused before the Complainant which has been recorded under Section 67 of the Act. Mr. Vaz has placed reliance on the case of **Surjeet Singh Chhabra** v. **Union of India and others** (AIR 1997 SC 2560) and in terms of the said Judgment submitted that the Customs Officials are

not Police Officers and the confession, though retracted is an admission and binds the petitioner. Mr. Vaz also placed reliance on the case of **Union of India** v. **Munna and another**(2004(6) Supreme 453/2004 AIR SC 4593) and submitted in terms of the said Judgment that an admission by an accused before the Customs Authorities in an N.D.P.S. case was not hit by Section 25 or Section 26 of the Evidence Act.

22. The case of **Rajesh Jagdamba Avasthi** v. **State of Goa**(supra) was a case where charas were recovered from the shoes of an accused and it was stated by the prosecution that from the shoe of the right foot 100 gms. were recovered and from the shoe of the left foot 115 gms. were recovered and the said substance was packed and sealed in two envelopes marked A and B respectively. The Junior Scientific Officer had found in envelope A 98.16 gms. of charas while in envelope B he had found 82.54 gms. of charas. The High Court found that from envelope B which was said to contain 115 gms. of charas, what was found was only 82.52 gms. of charas and that could be considered to be a minor discrepancy and, therefore, was of the view that even if the sample contained in envelope B was not considered against the accused on account of the said discrepancy in weight, the case against the accused was established on the basis of charas recovered, packed and sealed in envelope A. It was submitted before the

Apex Court that the High Court was not justified in upholding the conviction of the appellant on the basis of what was recovered from only envelope A ignoring the quantity found in envelope B because there was only one search and seizure and whatever was recovered from the accused was packed in two envelopes. The Apex Court held that the credibility of the recovery proceedings got considerably eroded if it was found that the quantity by PW1/Mahesh Kaissare was less than quantity sealed and sent to him and the question was not how much was seized but whether there was actually seizure and what was seized was sent for chemical analysis to PW1/Mahesh Kaissare and since the prosecution was not able to explain the said discrepancy the case of the prosecution was rendered doubtful. It was also a case, as noted by the Apex Court in para 15 of the Judgment that the seal and the seized packets had remained with the same Inspector and, therefore, there was justification for the argument that since the seal as well as the packets were in the custody of the same person, there was every possibility of the seized sample being tampered with and that is the only hypothesis on which the discrepancy in weight could be explained and the least was that on the facts of the case there was serious doubt about the truthfulness of the prosecution case. In the case of **Madan Lal and another** v. **State of Himachal Pradesh**(2003 GLT 3868) the Supreme Court again had an occasion to consider a case of reduction of weight of the

samples sent for analysis and the Supreme Court observed that that aspect was considered by the trial Court and the view of the trial Court was endorsed by the High Court and since there was very minimal and almost ignorable variation in weight, the Supreme Court found that there was no reason to interfere with the findings. In fact, one does not know what was the difference in weight which was found in the case of **Madan Lal and another** v. **State of Himachal Pradesh**(supra).

23. In my view, the ratio of the case of **Rajesh Jagdamba Avasthi** v. **State of Goa**(supra) cannot be applied squarely to the facts of this case because in this case the seizure was made by the Complainant who is a Gazetted Officer. Since sample S-2 and the remnant quantity was deposited in the Warehouse at about 3.30 p.m., it is safe to presume, in the absence of any other evidence, that the sample S-1 was sent to the Director, Food and Drugs Administration at the same time or thereabout. The statements recorded of the accused under Section 67 of the Act show that they were completed at about 6 a.m. on 20-2-2001 and they show that the Complainant had worked in connection with this case through the night of 19/20-2-2001. There is no provision in the Act and in fact no provision has been brought to my notice that the seal with which the sample is sealed is also required to be deposited with an Officer other than the Officer seizing

the articles but the fact remains that after 6 a.m. till about 3.30 p.m., the seal, the samples and the remnant quantity had remained in possession of the Complainant himself but one certainly immediately need not jump to the conclusion that the Complainant during the said time had interfered and tampered with the sample S-1 which was sent for analysis to the Director of Food and Drugs Administration. It may be stated that the complainant was less than prompt in despatching the sample S-1 to the Laboratory and the other sample and the remnant quantity to the Warehouse but it is quite possible that having worked during the night he had to secure 40 winks so as to say or some rest, before he could start to work all over again. In my opinion, there is no room for suspicion that in this case the sample S-1 or the remnant quantity was interfered with for more reasons than one. Firstly, because the Complainant in this case is a Gazetted Officer and law in general and the Act in particular certainly enjoins that the Courts give greater credibility to such Gazetted Officers. Secondly, because in this case there are confessional statements recorded by the Complainant under Section 67 of the Act to which reference would be made in a greater detail, little later. Thirdly, this is a case of increase in weight rather than decrease in weight and it is inconceivable to think that the Complainant added more substances and increased the weight. Suffice it to observe that the difference in weight of the sample S-1 was quite

probable due to the fact that PW1/Kaissare weighed the contents of the sample S-1 on a more sensitive or accurate scale than the one used by Inspector Cruz/PW7 and as far as the remnant quantity is concerned, it could be due to the same reason and also because it was weighed along with the wrapper. It is to be noted that PW1/Kaissare had found the seals on the sample S-1 intact and had tallied the same with the specimen seal impression sent separately by the Complainant. There is, therefore, no room for doubt that the contents of sample S-1 or for that matter the remnant quantity were interfered with by the Complainant. PW1/Kaissare had found the remnant quantity sealed and in case there was any tampering with the seals, he would have definitely stated that the seals had been tampered with.

24. The Complainant recorded the statements of both the accused which have been produced at Exhs.90 and 92 respectively. These statements were in fact recorded by the complainant himself in his presence though the same were written down by Inspector Pandey who was a member of the raiding party. The words used by the Complainant are that they were recorded by Pandey. Since the said statements were recorded by the Complainant and in his presence and written down by the said Pandey, in my view, the non examination of the said Pandey is not at all fatal to the

case of the Complainant. Before the statements were recorded, and when the accused were intercepted, A-1/Arolkar being questioned by the Complainant regarding the contents of the bag, had replied that it contained brown sugar. This statement of A-1/Arolkar was both relevant and admissible, though the learned Special Judge wrongly noted that it was not so. The said statements were subsequently retracted by both the accused. A-1/Arolkar chose not to retract the said statement even when he was examined under Section 313 of the Code of Criminal Procedure, 1973 (Code, for short). A-1/Arolkar retracted the same by filing a statement on 21-1-2004 purporting it to be a statement under Section 313 of the Code when in fact, the Code does not contemplate the accused filing any statement under Section 313 in writing though, in terms of Section 233(2) of the Code an accused is entitled to file a written statement of defence. Recording a statement under Section 313 of the Code is not an empty formality. As far as the Court is concerned, a duty is cast on the Court to draw the prisoner's attention to every inculpatory material so as to enable him to explain the same. This being the basic fairness of a criminal trial and in the event of evidenciary material not being put to the accused, the Court must ordinarily eschew such material from consideration. As far as the accused is concerned, it gives him an opportunity to explain the said inculpatory material and in case of refusal to give an answer or plausible

explanation, the Court is at liberty to assume that the accused has no answer or plausible answer to the inculpatory material to which his attention is drawn by the Court. A written statement under Section 233(2) of the Code would be relevant only in case where the accused has to give evidence in the light of the written statement filed by him and not otherwise.

25. Although, no summons are required to be issued before recording a statement under Section 67 of the Act only because summons were issued in this case as per the practice followed by the Customs Officers in other custom cases the same is not sufficient to conclude that the recording of the statements was a mere farce as contended on behalf of the accused by learned Counsel Mr. Kanekar. In fact issuing of such summons will at least put the accused on notice about the proposed recording of statement. A-1/Arolkar in his statement at Exh.90 has set out as to how he came to acquire about 2 kgs. of brown sugar from A-3/Datta alias Bhai alias Nana Kundnekar and then stated that:

> "... I proceeded to Calangute and met Shri Datta alias Bhai alias Nana and told him that I required staff on 19-2-2001. Shri Datta told me to come and collect the staff from Calangute in the evening at around

18.30 hours. Accordingly at 18.00 hours I proceeded to Calangute along with my friend Surendra on scooter bearing registration no.GA-01-M-2034. I stopped the scooter near the petrol pump and we walked and met Datta at Panchdeep Hotel and collected the plastic carry bag containing the 2 kgs. I opened the carry bag and had a cursory look at the stuff which was packed in the two transparent polythene bags. Myself, Datta and Surendra had tea and then I and Surendra proceeded along with the bag to where the scooter was parked. Surendra Kerkar held the bag as I had to ride the scooter. I rode the scooter and was proceeding to Panaji when the officers stopped the scooter which I was riding and Surendra as a pillion rider near Sai Service, Porvorim. The officers asked me and Surendra whether they were in possession of narcotics and also asked contents of plastic carry bag to which I admitted that the plastic carry bag contained brown sugar. Thereafter officers took us to Panaji Custom Office...".

26. A-2/Surendra Kerkar in his statement at Exh.92 stated thus:-

"Shri Nandkishor is my friend.... I usually used to meet him opposite State Bank of India, Mapusa ... . On 19-2-2001 at around 17.30 hours Shri Kishor met me at Mapusa near S.B.I. and requested me to accompany him to Calangute as he

(Kishor) had to meet one of his friend at Calangute. At 18.00 hours, we both, Kishor and myself proceeded to Calangute on scooter bearing registration no. GA-01/M-2034... Shri Kishor stopped the scooter near petrol pump and he walked to Panchdeep Hotel which is situated very close to the petrol pump. Kishor introduced me to one person as Datta. Shri Datta then handed over to Kishor one plastic carry bag which contained something. Then Shri Datta offered us tea at the said restaurant. We had the tea and then Kishor and myself proceeded to where the scooter was parked. Shri Nandkishor carried the plastic carry bag from the hotel till we reached the scooter. Shri Kishor then requested me to hold the said bag as he was going to ride the scooter. Thereafter Shri Kishor told me that we were going to proceed to Miramar. I further have to state that on reaching Provorim Circle, I enquired with Nandkishor about the contents of the plastic bag which he(Kishor) had given to me to which Nandkishor replied that it contained brown sugar (narcotic drugs). On our way to Miramar on the said scooter, the officers stopped us opposite Sai Motors, Porvorim and enquired about our identity. The officers then asked the contents of the bag to which Shri Kishor replied that the plastic carry bag contained brown sugar. Thereafter officers took us to Panaji Customs House Office ..."

27. The question before the Court is whether the statements recorded of both the accused contain an admission as in law understood only or a confession which as already stated has been subsequently retracted by A-1/Arolkar by said written statement dated 21-1-2004 and by A-2/Surendra by application submitted to the jailor on 23-5-2001. This has become necessary in view of the submission made by Mr. Vaz, the learned Special Public Prosecutor that the said statements recorded of A-1/Arolkar and produced at Exh.90 and that of A-2/Kerkar produced at Exh.92 were admissions made by them and similar statements, of course without much details, have been referred to as admissions in the case of **Union of India** v. **Munna and another** (2004 AIR SCW 4793/2004(6) Supreme 453) relied upon by Mr. Vaz.

28. A statement, an admission and a confession stand on separate footings and the word "confession" is a genus of them all. The word "statement" nor the word "confession" have been defined under the Indian Evidence Act, 1872. An "admission" has been defined by Section 17 of the Evidence Act. A "statement" is defined as the act of stating, reciting or presenting verbally or on a paper. An "admission" has been defined under Section 17 of the Act as a statement, oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or

relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned. Although, a confession will include an admission and in turn an admission a statement, the reverse is not necessarily true. If a person admits all facts necessary to convict him, it is a confession and if such admission does not give all essential elements of the crime, it is only an admission and not a confession. Confession in other words is a direct admission or acknowledgement of the guilt by a person who has committed a crime and it could be either judicial or extra-judicial. As per Stephen in his Digest of the Law of Evidence, a confession is defined as an admission made at any time by a person charged with crime stating or suggesting the inference that he has committed the crime. In order to distinguish a confession from an admission a simple test is applied and if a statement by itself is sufficient to prove the guilt of the maker it is the confession but if the statement falls short of it, it amounts to an admission. Where the admission extends only to the acceptance of a circumstance from which an inference of guilt can be drawn, but which is not conclusive to prove the guilt, it can be treated as an admission and the acid test which distinguishes a confession from an admission is that where conviction can be based on the statement alone, it is a confession and where some supplementary evidence is needed to record a conviction, then it is an admission. A confession must either admit in terms the offence or at any

rate substantially all the facts which constitute the offence, as stated by Lord Atkin in Privy Council decision in the case of **P. Narayan** v. **Emperor**(AIR 1999 P.C. 47). As said before, it is always said that every confession must necessarily be an admission but every admission does not necessarily amount to a confession. The law relating to admissions is contained in Sections 24 to 30 of the Evidence Act. Section 25 bars proof of confession made to a police officer and Section 26 goes a step further and prohibits proof of a confession made by any person whilst he is in custody of a police officer, unless it be made in the immediate presence of a Magistrate. Section 24 lays down the rule that a confession made under any inducement, threat or promise becomes irrelevant in criminal proceedings and such inducement, threat or promise is not required to be proved to the hilt but if it appears to the Court that the making of the confession was caused by any inducement, threat or promise, proceeding from a person in authority, the confession is liable to be excluded from evidence. It is now well settled that a Custom Officer is not a Police Officer and if any authority is required to support such a proposition then reference could be made to the decision of this Court in the case of **Nathubhai Babarbhai Patel** v. **State of Maharashtra and another** (2001 CRI.L.J. 536) wherein it has been stated that a confessional statement made to an officer empowered under Section 53 of the N.D.P.S. Act, 1985 is admissible in evidence against the person

making it since such an officer is not a police officer. Reference could also be made to the said case of **Surjeet Singh Chhabra** v. **Union of India and others**(AIR 1997 SC 2560) wherein it is stated that a Customs Officer is not a Police Officer. It may be further stated that although the Complainant was invested with powers of an Officer in charge of a police Station in terms of Section 53(1) of the Act, for the purpose of investigation the Complainant could not be said to be an Officer in charge of Police Station for all purposes as understood under the Code and Sections 25 and 26 of the Evidence Act are inapplicable to him. Reliance placed on behalf of accused on **Raja R. Jaiswal** v. **State of Bihar**(AIR 1964 SC 828) is wholly misplaced.

29. As to a retracted confession, the Supreme Court, speaking through four learned Judges in the case of **Pyare Lal** v. **State of Assam**(AIR 1957 SC 216) stated that:-

> "A retracted confession may form the legal basis of a conviction if the Court is satisfied that it was true and was voluntarily made. But it has been held that a Court shall not base a conviction on such a confession without corroboration. It is not a rule of law, but is only rule of prudence. It cannot even be laid down as an inflexible rule of practice or prudence that under no circumstances such a conviction can

> be made without corroboration, for a Court may, in a particular case, be convinced of the absolute truth of a confession and prepared to act upon it without corroboration; but it may be laid down as a general rule of practice that it is unsafe to rely upon a confession, much less on a retracted confession, unless the Court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars".

30. The Supreme Court again speaking through its three learned Judges in **Bharat** v. **State of U.P.**(1971(3) SCC 950) observed that "confessions" can be acted upon if the Court is satisfied that they are voluntary and they are true. The voluntary nature of the confession depends upon whether there was any threat, inducement or promise and its truth is judged in the context of the entire prosecution case. The confession must fit into the proved facts and not run counter to them. When the voluntary character of the confession and its truth are accepted it is safe to rely on it. Indeed, a confession, if it is voluntary and true and not made under any inducement, threat or promise, is the most potent piece of evidence against the maker. Retracted confession, however, stands on a slightly different footing. As the Privy Council, once stated, in India it is the rule to find a confession and to find it retracted later. A Court may take into account the

retracted confession, but it must look for the reasons for making of the confession as well as for its retraction, and must weigh the two to determine whether the retraction affects the voluntary nature of the confession or not. If the Court is satisfied that it was retracted because of an afterthought or advice, the retraction may not weigh with the Court if the general facts proved in the case and the tenor of the confession as made and the circumstances of its making and withdrawal warrant its user. All the same, the Courts do not act upon the retracted confession without finding assurance from some other sources as to the guilt of the accused. Therefore, it can be stated that a true confession made voluntarily may be acted upon with slight evidence to corroborate it, but a retracted confession requires general assurance that the retraction was an afterthought and that the earlier statement was true.

31. The statements recorded in this case of A-1/Arolkar and A-2/Kerkar and produced at Exhs.90 and 92 show that they are nothing but extra-judicial confessions recorded by the Complainant under Section 67 of the Act. The facts recorded therein clearly show that at the time both the accused were accosted and even prior to that they knew as to what was being carried by them was nothing but prohibited drugs, namely, brown sugar-heroin. If, it was the case of A-2/Kerkar that he came to know what

were the real contents of the said bag only on reaching Porvorim Circle then nothing prevented him from parting with the company of A/1/Arolkar and return to Mapusa. The said statements clearly show that both the accused were in conscious possession of the said brown sugar, A-2/Kerkar being in physical possession and A-1/Arolkar being in constructive possession and in the said confessional statements they have admitted this position and, therefore, the said statements Exhs.90 and 92 clearly show that they are not mere admissions but extra-judicial confessions recorded by the Complainant under the provisions of Section 67 of the Act. The facts stated in the said confessional statements are also independently proved by the Complainant through the evidence of other witnesses examined in the case. It may be stated that what is narrated by both the accused in the said statements could not come from the imagination of the Complainant for the statements of PW4/Shirodkar and PW5/Gadekar were recorded subsequently and they have co-related the facts mentioned in the said statements.

32. A last submission has been made on behalf of both the accused that both the accused could be convicted if at all, for possession of small quantity only, under Section 21(a) of the Act. Admittedly, the sample S-2 was not analysed at any time by the Junior Scientific Officer PW1/Kaissare who had analysed the sample S-1 on 5-3-2001 and the remnant quantity on

25-3-2002 after it was sent by the learned Special Judge, Mapusa. Mr. Kanekar has submitted that the seals of the remnant quantity were not compared by PW1/Kaissare with the specimen impression of seal earlier sent to him and, therefore, the weight of the remnant quantity has got to be excluded. In my view, the submissions of the learned Counsel in this regard are devoid of any merit. PW1/Kaissare has clearly stated that the remnant quantity sent to him by the Special Judge was in a sealed brown paper carton marked as Exh.A. There was no cross-examination on that aspect and therefore it could be safely inferred that the remnant quantity had remained sealed, as sealed at the time of seizure. In case the seals were in any manner tampered with, PW1/Kaissare would have definitely stated about the same. The evidence of the Complainant/PW6 and that of Kaissare/PW1 shows that the former had first tested with his Field Testing Kit both the double packed polythene bags and found that they tested positive for brown sugar and thereafter the contents of both the double packed polythene bags were emptied in a large transparent polythene bag and thoroughly mixed in the presence of the panch witnesses and again a pinch of the said contents were tested with the same kit and again found to be positive for brown sugar-heroin and then the contents of the transparent polythene bags were weighed and found to be 2.01 kgs. and only thereafter, two representative samples of 10 gms. each were taken into separate polythene bags, heat

sealed, etc. It is from one of these two samples of 10 gms. namely, from S-1 that PW1/Kaissare took 3 gms. and tested and found that they contained 29.29% W x W of heroin. In other words, the 3 gms. was a representative sample of 10 gms,(S-1) which in turn was a representative sample of the entire quantity of 2.01 kgs. found with the accused and when the said representative sample confirmed that what was tested by Kaissare/PW1 contained heroin it should follow therefrom that the sample also represented the contents of the said larger quantity namely, 2.01 kgs. As far as the analysis of the remnant quantity carried out on 25-3-2002 is concerned, the same has also been independently found to have contained 30.60% W x W of heroin. Since 3 gms. analysed by PW1/Kaissare represented the sample S-1 of 10 gms. and the latter as a sample of the entire quantity of 2.01 kgs. which were in fact found to be 2.055 kgs. by PW1/Kaissare, the accused were rightly convicted for having found in possession of commercial quantity, 250 gms. having been declared as commercial quantity in relation to brown sugar-heroin and 5 gms. having been declared as small quantity.

33. The Complainant's case regarding the seizure was fully corroborated by the Customs Inspector PW7/Cruz as well as the

independent panch witness namely, PW3/Arnald. The surrounding circumstances as spelt out by the accused and more particularly by A-1/Arolkar in his statement Exh.90 were corroborated by PW4/Shirodkar and PW5/Gadekar. Both the accused were accosted at about 8.15 p.m. on 19-2-2001 and the said confessional statements under Section 67 of the Act were recorded after issuing summons to the accused at about 6 a.m. or thereabout on 20-2-2001. There is nothing on record to suggest that the said statements were involuntary or were recorded under any fear, threat or inducement or any promise. From the day they were recorded, the said accused must have certainly been produced before the learned Special Judge several times and during those times, the accused did not retract the said statements. As already stated, A-1/Arolkar retracted the same after filing of the complaint on or about 23-5-2001 and A-2/Kerkar retracted the same only in his written statement on or about 21-2-2004. When -1/Arolkar was questioned about the said statement at Exh.90, all that A-1/Arolkar stated that he did not wish to answer anything about the same and even at that stage, it was not the case of A-1/Arolkar that the said statement Exh.90 was recorded by any inducement, threat or promise. When A-2/Kerkar was questioned about Exh.92, all that he stated was that it was false and it was not his case also that the said statement Exh.92 was recorded under any threat, inducement or promise. In the circumstances, the retraction of the

said statements by the accused has got to be considered as done by way of an afterthought and on legal advice and being so, the subsequent retraction of the said statements is of no legal consequence. The Complainant's case is not sought to be based only on the said confessional statements. The Complainant has independently proved his case beyond reasonable doubt. The said confessional statements provide additional assurance about the truthfulness of the case of the Complainant. It has also been stated by the Apex Court in the case of **M. Prabulal** v. **Assistant Director**, (AIR 8 SCC 449) that when such statements are voluntary they can be made the basis of conviction.

34. In my view, the learned Special Judge after considering the evidence led by the Complainant rightly came to the conclusion that the Complainant had proved his case beyond reasonable doubt that the accused were found in possession of brown sugar-heroin weighing 2.01 kgs. for which they could not lawfully account for. Section 54 creates a presumption and provides that in trials under the Act, it may be presumed, unless and until the contrary is proved that the accused had committed an offence under this Act in respect of any narcotic drug or phychotropic substance. The said presumption has also got to be drawn against the present accused which the accused have failed to rebut.

35. As a result, I find there is no merit in this appeal and the same is hereby dismissed.

N. A. BRITTO, J.

RD.